St. James Associates, a Limited Partnership, d/b/a Smith & Wollensky *and* Hotel Employees and Restaurant Employees Union, Local 100, New York, New York & Vicinity. Case 2–CA–26886

January 31, 1995

DECISION AND ORDER REMANDING

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On September 19, 1994, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. The General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.

1. The General Counsel has excepted to the judge's failure to find that the Respondent violated Section 8(a)(1) of the Act by threatening employees with more onerous and less remunerative working conditions if the Union pursued grievances against the Respondent. We have decided to remand the 8(a)(1) allegation to the judge and shall direct him to make appropriate credibility resolutions regarding the conflicting testimony of John Collins and John Gerdus.

The Respondent is a restaurant in New York City. For a number of years the Union has been recognized as the exclusive collective-bargaining representative of the Respondent's waiters. The Respondent and the Union have been parties to successive collective-bargaining agreements, the most recent of which was effective from September 1, 1991, to August 31, 1994.

In June or July 1993,[2] Timothy Lynch, a union organizer, in response to complaints from a number of unit employees, came to the Respondent's premises to examine the sign-in sheet[3] in order to determine whether the employees were properly signing in and out.[4] Lynch noticed that several employees who were working that evening, including waiter John Collins, had not signed in. Lynch discussed the situation with Collins and told Collins that he was required to sign in and out properly. When Night Manager John Gerdus saw Lynch looking at the sign-in sheet he grabbed the sheet out of Lynch's hand and told him he had no business looking at it and that he should ''get lost.'' Lynch told Gerdus that he had every right to look at the sign-in sheet, but he ''chose not to argue'' with Gerdus at that point.

Collins, a former assistant shop steward, testified that shortly after his conversation with Lynch, two managers expressed annoyance that Lynch was at the restaurant and told Collins that they did not think it was appropriate for Lynch to have come in at that time. Collins further testified that later that same evening,[5] Gerdus said to him, ''[Y]ou're a big union man. If Lynch wants to come around here . . . breakin' balls, I'll break balls too. We'll have 16 stations upstairs, we'll have 14 stations downstairs.''[6] Collins testified that he responded that he and his partner would work anywhere as long as they got the same covers as everyone else.[7] According to Collins, Gerdus then told Collins he would no longer be working with his usual partner.

The Respondent presented Gerdus as its only witness. In response to a question about whether he made the statements attributed to him by Collins, Gerdus testified, ''Not that I recall, no.'' He was then asked if he recalled any conversation in August 1993 with Collins when Lynch was there or had been there. Gerdus testified, ''I don't remember it.''

The judge dismissed the 8(a)(1) allegation. The judge found that even if he were to credit Collins' testimony, ''it is not at all clear that a threat was made.'' He then stated that ''inasmuch as Gerdus has denied making the alleged threat and there is no corroboration of Lynch's [sic][8] testimony, I find that General Counsel has not shown by a preponderance of the evidence that the statement was made.''

Contrary to the judge, we find that the comments attributed to Gerdus by Collins, if made, clearly conveyed a threat of adverse consequences because of Lynch's visit to the jobsite. The judge found that it was unclear from the testimony whether an increase in stations was a threat of more onerous and less remu-

[1] No exceptions were filed to the judge's finding that the Respondent was not required to provide the employees' social security numbers to the Union.

[2] All dates are in 1993 unless otherwise specified.

[3] According to Lynch, the sign-in sheets are supposed to indicate the shift and hours an employee actually worked.

[4] Lynch testified that improper signing in and out was of concern to the Union because it allowed for tips to be incorrectly allocated to those employees who properly signed in, thereby causing them to be overtaxed. The sign-in sheets were also relevant for determining whether the Respondent was paying the appropriate amounts into the pension and welfare funds, because the collective-bargaining agreement provided that the contributions were to be calculated per shift worked. The Union also needed the sign-in sheets to determine whether seniority was being followed in shift assignments.

[5] Collins testified that this incident occurred ''sometime around August.''

[6] A station is a group of tables served by a team of two waiters. At the time of this incident there were 14 stations upstairs and 10 downstairs.

[7] The number of covers is the number of persons served at each table.

[8] It was Collins, not Lynch, who testified concerning the alleged threat to add stations.

nerative working conditions. In his decision the judge speculated as to several possible effects of adding stations. A review of the record indicates that the judge misinterpreted the testimony. The testimony was consistent and uncontroverted that the addition of more stations means that the number of waiters would increase while the number of total tables to be served would remain constant. Thus, each waiter's share of the customers would decrease, resulting in a decrease in covers and tips. We find that this constitutes a threat of less remunerative working conditions. Further, even if the Respondent's statement could be interpreted as meaning that it would add more stations without increasing the number of waiters, the result to the employees would be an increase in their workload, which could be considered by employees to be a detrimental change in their working conditions. Moreover, in light of the accompanying statement by Gerdus that he would ''break balls,'' there can be no doubt that the statement concerning the addition of stations was meant to convey a threat of negative consequences.

Because he apparently was of the erroneous view that the statement attributed to Gerdus by Collins was not coercive, the judge did not specifically credit or discredit Collins' version. The judge simply noted that Collins' version was uncorroborated and that Gerdus denied making the statement.[9] The judge found, in these circumstances, that there was a failure of proof on the part of the General Counsel.

Although it can be argued that perhaps the judge implicitly credited Gerdus, he did not clearly find that Gerdus did not make the statement. Instead, the judge appears to have applied an ad hoc presumption that a denial that a statement was made coupled with an absence of corroboration is a failure of proof on the part of the General Counsel. In our view, this is not a credibility resolution regarding which of the two conflicting versions actually occurred. Accordingly, as a practical matter, we are faced with no credibility resolution at all. In these circumstances it is customary for the Board to remand the matter to the judge for the making of the appropriate initial credibility resolution.[10]

Accordingly, we shall remand the 8(a)(1) allegation to the judge for the limited purpose of making specific credibility resolutions concerning the testimony of Collins and Gerdus, and the issuance of findings of fact, conclusions of law, and a supplemental recommended Order with respect to the 8(a)(1) allegation.

2. The Respondent has excepted to the judge's findings that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with copies of the daily sign-in sheets and the number of covers served by each waiter in each shift. The Respondent argues that it was not required to provide the sign-in sheets because they are no longer used for tip allocation purposes.[11] We reject the Respondent's contention. Even assuming that the sign-in sheets are no longer used by the Respondent for tip allocation purposes, the Respondent has failed to rebut the General Counsel's evidence that the sign-in sheets are relevant for other purposes. For example, the sign-in sheets are relevant to the Union in monitoring whether proper contributions are being made by the Respondent to the pension and welfare funds,[12] and whether seniority has been complied with in assigning work shifts. The sign-in system is still in use, and has not been abandoned by the Respondent. Moreover, the evidence established that even if the affidavit system has replaced the sign-in sheet system for tip allocation purposes, the Union still needs the sign-in sheets in order to enable it to ''understand the system and rectify the wrongs.'' Union organizer, Timothy Lynch, testified without contradiction that the new affidavit system did not negate the need for the sign-in sheets because there were ways in which dishonest employees and employers could circumvent the new system and misallocate tips to employees.

We also reject the Respondent's argument that it should not be required to provide information about the number of covers because the source of that information, the dinner checks, is unreliable[13] and would not assist the Union in its collective-bargaining responsibilities. Even if the checks are not wholly reliable, we cannot find that they are irrelevant.

Article 24 of the parties' collective-bargaining agreement provides that ''[i]f at any time the number of covers served by any waiter shall be 10% lower than the average number of covers served by all waiters, the Union shall have the right to treat the matter as a

[9] The General Counsel argues, inter alia, that the judge erred in treating Gerdus' testimony that he did not recall making the statements attributed to him by Collins as a denial. Contrary to the General Counsel, we consider Gerdus' testimony to be a denial of Collins' version notwithstanding that he accompanied his ''No'' response with a ''not that I recall.'' If the denial is equivocal and less than forceful, that is a matter relevant to the weight properly accorded to the denial; it does not mean that the opposing version of the events is uncontradicted. In any event, these are matters that the judge must determine in the first instance.

[10] See, e.g., *Chicago Tribune Co.*, 304 NLRB 259, 261 (1991) (failure to make definitive factual findings warrants remand); *Roto Rooter*, 283 NLRB 771, 773 (1987) (avoidance of clear credibility resolution warrants remand); *Arrow Sash & Door Co.*, 276 NLRB 1166 (1985) (failure to resolve conflicts in testimony warrants remand).

[11] The Respondent maintains that at the time of the hearing it had initiated a system in which employees sign an affidavit every night claiming the amount of tips received that night.

[12] Under the parties' most recent collective-bargaining agreement, such contributions are calculated based on the number of shifts worked.

[13] The Respondent presented a dinner check on which the number of covers was apparently falsified.

grievance and refer the matter for arbitration.'' Thus, the Union is responsible for monitoring the number of covers. The Respondent has attempted to defend its failure to provide this clearly relevant information to the Union by arguing that its system for keeping track of the number of covers is inaccurate. This attempt merely underscores the necessity for the Union to receive the information. Determining the accuracy of the Respondent's recordkeeping system is a necessary part of monitoring whether the Respondent is properly and fairly assigning work to unit employees.

Because we agree with the judge that the information the Union requested was necessary and relevant to the Union's performance of its collective-bargaining duties, we find that the Respondent violated Section 8(a)(5) and (1) by failing to provide that information.

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 6.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, St. James Associates, a Limited Partnership, d/b/a Smith & Wollensky, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for the last paragraph of the judge's recommended Order.

''IT IS FURTHER ORDERED that the portion of this proceeding relating to the complaint allegation that the Respondent violated Section 8(a)(1) by threatening employees with more onerous and less remunerative working conditions if the Union pursues grievances against the Respondent be remanded to Judge D. Barry Morris for the purpose of making credibility resolutions concerning the conflict in the testimony of John Collins and John Gerdus. The judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and a recommended Order in light of the Board's remand. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.''

Kevin M. Smith. Esq., for the General Counsel.
A. Michael Weber, Esq. (Roberts & Finger), of New York, New York, for the Respondent.
Stephen F. O'Beirne, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York, New York, on July 27, 1994. On a charge filed on October 5, 1993, an amended complaint was issued on February 24, 1994, alleging that St. James Associates, a Limited Partnership, d/b/a Smith & Wollensky (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by threatening employees with more onerous and less remunerative working conditions and by failing to furnish the Union with information requested by it. Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on September 1, 1994.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited partnership with an office and place of business in New York City, has been engaged in the operation of a public restaurant know as Smith & Wollensky which sells food and beverages. Annually Respondent derives gross revenues in excess of $500,000 and purchases and receives at its facility goods and products valued in excess of $5000 directly from points located outside the State of New York. I find that at all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, I find that at all material times Hotel Employees and Restaurant Employees Union, Local 100, New York, New York & Vicinity (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

For a number of years the Union has been the exclusive collective-bargaining representative of Respondent's waiters and has been recognized as such representative by Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from September 1, 1991, to August 31, 1994. Timothy Lynch, a union organizer, testified that he came to the restaurant in June or July 1993,[1] looked at the sign-in sheets and saw that some of the waiters who were then working in the restaurant, had not signed in. Lynch testified that John Gerdus, the night manager, told Lynch that he had no right to be inspecting the sign-in sheets and that he should ''get lost.'' John Collins, a waiter with Respondent and a former assistant shop steward, testified that later in the evening, after Lynch examined the sign-in sheets, Gerdus told Collins, ''[Y]ou're a big union man. If Lynch wants to come around here . . . 'breakin' balls,' I'll break balls too. We'll have 16 stations upstairs, we'll have 14 stations downstairs.'' Gerdus denied making the statement.

On August 23 Lynch sent a letter to Thomas Hart, general manager of Respondent, which stated in pertinent part:

[1] All dates refer to 1993 unless otherwise specified.

> The problem of not signing in and out is still continuing. I formally request that the shop stewards be given copies of the daily sign-in sheets and schedules so that they can best attempt to rectify this very serious matter.

By letter dated September 29, A. Michael Weber, counsel for Respondent, forwarded to Lynch a ''list of employees . . . by name, address, date of hire, position, contract rate, hours worked, assigned shift and usual days off.'' On October 4 Lynch sent another letter to Hart, requesting the following information:

> 1. Waiter's Name.
> 2. Date of each shift worked in the last 6 months.
> 3. Station number for each individual shift.
>
> (a) Name of team partner on each shift.
> (b) Number of covers served by that team during each individual shift.

On November 30 Lynch wrote to Weber requesting that Respondent furnish the Union with the following information:

> Wage scales actually paid, full names, accurate shifts, hours worked and days off, social security numbers, actual job classifications . . . .

B. *Discussion and Conclusions*

1. Threats

The complaint alleges that Gerdus threatened employees with more onerous and less remunerative working conditions if the Union pursued grievances against the Respondent. Collins testified that in August Gerdus threatened to increase the stations and stated that he would ''break balls.'' Gerdus denied making the threat. It was unclear from the testimony whether an increase in stations meant just adding extra tables or also included adding extra waiters. If the alleged threat meant that extra tables would be added without adding extra waiters, while that may have meant more work for the present waiter staff, it also would have meant more remuneration. On the other hand, if the alleged threat meant that not only would there be additional tables but there would also be additional waiters, there should not have been any impact on the present waiter staff. Accordingly, even were I to credit Collins' testimony, it is not at all clear that a threat was made. However, inasmuch as Gerdus has denied making the alleged threat and there is no corroboration of Lynch's testimony, I find that the General Counsel has not shown by a preponderance of the evidence that the statement was made. Accordingly, the allegation is dismissed.

2. Request for information

Respondent argues that the information requested by the Union is not relevant to its duties. Lynch testified that the information was necessary to pursue grievances, to monitor that the waiters were getting a fair distribution of covers (persons per table), that the waiters were being paid properly, that assignments were being made according to seniority, and that the proper payments were made to the pension and welfare funds. The Board has long held that ''an employer must furnish information that is of even probable or potential relevance to the Union's duties.'' *Conrock Co*., 263 NLRB 1293, 1294 (1982), enfd. mem. 735 F.2d 1371 (9th Cir. 1984); *Postal Service*, 308 NLRB 358, 359–360 (1992). I find that the information requested by the Union is relevant to its duties. While Respondent contends that it did in fact supply some information, I find that the information was incomplete. See *Top Job Bldg. Maintenance Co*., 304 NLRB 902, 909 (1991). For example, in some instances full names, hours worked, accurate job classifications, and wage scales actually paid were not supplied.

In its brief Respondent contends that it did not save the sign-in sheets from ''week to week.'' Counsel further argues that it ''would have been impossible for Smith & Wollensky to provide them to the Union.'' Other than counsel's assertion in the brief, there is no evidence in the record that the sign-in sheets are not available. Gerdus, the only witness called by Respondent, was not asked whether the sign-in sheets were available. As stated in *Arch of West Virginia*, 304 NLRB 1089 fn. 1 (1991), ''as the Union has shown the relevance of the information sought, it need not accept Respondent's conclusionary statement that such information is unavailable. *Doubarn Sheet Metal*, 243 NLRB 821, 824 (1979).'' Respondent also maintains that it was not required to furnish the employees' social security numbers. As the Board held in *Sea-Jet Trucking Corp*., 304 NLRB 67 fn. 3 (1991), social security numbers are not presumptively relevant. In *Postal Service*, 307 NLRB 1105 (1992), the Board stated: ''the General Counsel and the Union failed to demonstrate the relevance of the social security numbers and thus failed to show any special circumstances warranting the furnishing of the social security numbers. Similarly, in this proceeding, I do not believe that the General Counsel or the Union has demonstrated the relevance of the social security numbers. Accordingly, I find that Respondent has violated Section 8(a)(1) and (5) of the Act because of its failure to furnish the Union with the information requested by it. Respondent, however, will not be required to furnish the employees' social security numbers.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive representative of the following appropriate unit of employees:

> All employees of the Respondent as listed in Schedule A of the parties' collective-bargaining agreement, but excluding the general manager, the day manager, the night manager, the relief manager, the maitres d'hotel, the day chef, the night head chef and bar managers and other managerial employees, and guards, professional employees and supervisors as defined in the Act.

4. By failing and refusing to furnish the Union with the relevant information requested by it, Respondent has violated Section 8(a)(1) and (5) of the Act.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not violate the Act in any other manner alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, St. James Associates, a Limited Partnership, d/b/a Smith & Wollensky, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Hotel Employees and Restaurant Employees Union, Local 100, New York, New York & Vicinity by refusing to furnish it with the information requested by it on August 23, October 4, and November 30, 1993, except for social security numbers.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Sectior 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, except for social security numbers, furnish the Union with the information it requested on August 23, October 4, and November 30, 1993.

(b) Post at its facility in New York, New York, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations of the complaint as to which no violations have been found are dismissed.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Hotel Employees and Restaurant Employees Union, Local 100, New York, New York & Vicinity by refusing to furnish the information requested by the Union on August 23, October 4, and November 30, 1993, except for social security numbers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, furnish the Union with the information requested by it on August 23, October 4, and November 30, 1993, except for social security numbers.

ST. JAMES ASSOCIATES, A LIMITED PARTNERSHIP, D/B/A SMITH & WOLLENSKY